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No. 92-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION,
Petitioner,

v.

KATHLEEN E. LES; FRANCES LES THOMAS; MANUEL JESUS PEREZ MORALES; DAVID R. PEREZ; MANUEL R. PEREZ,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* ON BEHALF OF AMERICAN SOYBEAN ASSOCIATION, NATIONAL ASSOCIATION OF WHEAT GROWERS, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL COTTON COUNCIL OF AMERICA IN SUPPORT OF PETITIONER

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Dated: January 14, 1993

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Pursuant to Rule 37.2 of the Rules of this Court, the American Soybean Association, National Association of Wheat Growers, National Corn Growers Association, and National Cotton Council of America respectfully move for leave to file the attached brief as *amici curiae* in support of the National Agricultural Chemicals Association's Petition for Writ of

Certiorari. Although counsel for Petitioner and the United States have consented to the filing of this brief, counsel for the parties which were Respondents and Respondent-Intervenors below has refused to give his consent.

The *amici curiae* are national trade associations whose members produce most of the soybeans, wheat, cotton and corn grown in the United States.[1] The *amici* estimate that the aggregate annual value of the commodities they produce is approximately $40 billion. An estimated average $11.5 billion worth of these commodities was exported annually between 1980 and 1987 alone.[2]

In order to sustain this impressive level of production, the members of the *amici* associations (referred to collectively herein as the "*amici*") depend upon access to a variety of exhaustively tested, EPA registered crop protection pesticide products to control the spread of crop destroying insects, weeds and diseases. Numerous pesticides registered for—and safely used on—soybean, wheat, corn and cotton crops would be lost under EPA's current policy if the strict read-

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[1] The **American Soybean Association** is a national commodity organization with 28,500 members, and affiliation with 29 states. The **National Corn Growers Association** represents approximately 25,000 corn farmers in 47 states. The **National Association of Wheat Growers** represents 60,000 growers in 22 states, who produce 85 percent of all U.S. wheat. The **National Cotton Council of America** is the central organization of the cotton industry, representing producers, ginners, oilseed crushers, merchants, cooperatives, warehousemen and textile manufacturers.

[2] National Research Council, *Alternative Agriculture*, at 29 (1989).

ing of the Delaney clause mandated by the Ninth Circuit is upheld.[3] Without these pesticides, the ability of the *amici* to continue to produce an affordable, abundant food supply would be jeopardized.

The *amici* seek leave to file this brief in order to describe the scope of the substantial impact of the Ninth Circuit's decision in *Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992), on American agriculture, and to illustrate the crucial role that pesticides play in the production of food and fibre. This brief will show (1) how the intent of Congress as shown in both the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988 & Supp. III 1991) and the Federal Food, Drug and Cosmetic Act ("FFDCA"), 21 U.S.C.A. §§301-394 (West 1972 & Supp. 1992) would be frustrated, and (2) how the integrated system for the approval and use of safe and effective pesticides by growers would be seriously compromised if the Court did not grant the National Agricultural Chemicals Association's Petition for Writ of Certiorari, and reverse the Ninth Circuit's erroneous decision.

For the foregoing reasons, *amici curiae* American Soybean Association, National Association of Wheat Growers, National Corn Growers Association, and National Cotton Council of America respectfully request that they be allowed to participate in this case by filing the attached brief.

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[3] Environmental Protection Agency, *List of Chemicals Evaluated for Carcinogenic Potential* (October 14, 1992).

Respectfully submitted,

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QUESTION PRESENTED

Does the United States Environmental Protection Agency have authority to establish a *"de minimis"* exception to § 409(c)(3)(A) of the Federal Food, Drug and Cosmetic Act (the "food additive Delaney Clause," 21 U.S.C. § 348(c)(3)(A)) to allow use of beneficial, agricultural pesticides which are carcinogenic in laboratory animals, but pose virtually no risk of cancer to consumers of processed foods?

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BRIEF *AMICUS CURIAE* ON BEHALF OF AMERICAN SOYBEAN ASSOCIATION, NATIONAL ASSOCIATION OF WHEAT GROWERS, NATIONAL CORN GROWERS ASSOCIATION, and NATIONAL COTTON COUNCIL OF AMERICA IN SUPPORT OF PETITIONER

Petitioner and the United States Environmental Protection Agency ("EPA") having consented, the American Soybean Association, National Association of Wheat Growers, National Corn Growers Association, and National Cotton Council of America hereby

submit this brief and the accompanying Motion for Leave to File Brief as *amicus curiae*. The brief supports the position of the petitioner, the National Agricultural Chemicals Association ("NACA"), that the Ninth Circuit's decision in *Les v. Reilly*, 968 F.2d 985 (9th Cir. 1992), raises issues of profound nation-wide significance, with "far-reaching consequences for the public, agriculture, the food and pesticide industries, and EPA's pesticide regulatory program." Petition for Writ of Certiorari at 11.

INTEREST OF THE AMICI

The interests of the *amici curiae* are set forth fully in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The amici agree with but will not repeat here the well-reasoned defense of the *de minimis* policy as it applies to pesticides, articulated previously by the EPA in its Brief to the Ninth Circuit, Petition for Rehearing, and Motion for Stay of Issuance of Mandate, and as raised in this Court through petitioner NACA's Petition for Writ of Certiorari. Rather, this brief will demonstrate the nationwide significance of the Ninth Circuit's decision by describing the effects of that decision on agriculture.

Specifically, this brief will show how the unwarranted loss of valuable pesticide products and uses due to the Ninth Circuit's extraordinarily rigid interpretation of the Delaney clause will (1) frustrate the congressionally mandated objectives of providing farmers with access to the effective and affordable products they need on the farm, and of assuring a safe, affordable and abundant food supply, and (2)

prevent the full implementation and adoption of modern farming practices which are more sensitive to the environment.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION WILL DEFEAT CONGRESSIONALLY MANDATED OBJECTIVES FOR THE USE OF AGRICULTURAL PESTICIDES

The use of agricultural pesticides in the United States is regulated under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988 & Supp. III 1991), which this Court has described as a "comprehensive regulatory statute," *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). FIFRA's regulation of pesticide use is integrated with another federal law directed to regulating the consequences of such use in connection with food and food products. The Federal Food, Drug and Cosmetic Act ("FFDCA"), 21 U.S.C.A. §§301-394 (West 1972 & Supp. 1992), requires EPA to establish allowable residue levels in crops and certain processed foods (i.e., tolerances) for pesticide products which are registered for use under FIFRA.[4] As both the express terms and legislative histories of FIFRA and FFDCA show, Congress has recognized the valuable role played by pesticides in agricultural production and the need for a balanced regulatory approach to their safe and beneficial use.

At issue in this case is the proper interpretation of the Delaney clause (FFDCA § 409(c)(3)(A), 21 U.S.C. § 348(c)(3)(A)), considering the otherwise con-

[4] FFDCA § 408 directs EPA to establish tolerances for pesticide residues in raw agricultural commodities, and § 409 directs EPA to establish tolerances for pesticide residues in processed foods.

sistent treatment of pesticides under FIFRA and other FFDCA provisions. A rigid interpretation of that clause results in two separate conflicts, which EPA must reconcile. First, a pesticide is registered for use under FIFRA if it does not pose "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136a(b). The pesticide-specific tolerance provision of the FFDCA (§ 408, known as the "pesticide residue provision") also utilizes a similar risk-benefit balancing scheme. 21 U.S.C. § 346a(b). The solitary exception to this unified standard is the Delaney clause (§ 409 of the "food additive provision") which, if read literally, would establish a zero-risk standard. Consequently, the risk-benefit FIFRA standard is in direct conflict with the risk-only Delaney clause of the FFDCA.

A second conflict is within the FFDCA itself: between § 408 (the pesticide residue provision, which allows a risk-benefit consideration in establishing a tolerance), and § 409 (the food additive provision, which contains the zero-risk Delaney clause). In order to logically reconcile and make regulatory sense of these conflicting provisions, EPA adopted a *de minimis* interpretation to the Delaney clause. 56 Fed. Reg. 7750 (Feb. 25, 1991). By vacating EPA's *de minimis* interpretation, the Ninth Circuit has improperly second-guessed EPA's resolution of these conflicts,[5] and frustrated congressional intent with regard to the availability and use of pesticides.

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[5] *See, Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985). This is particularly

The impact of the Ninth Circuit's ruling on the *de minimis* interpretation is not merely academic—valuable pesticide products and uses will be lost.[6] As set forth below, the legislative histories of both FIFRA and FFDCA repeatedly confirm the valuable and necessary role played by pesticides in agricultural production. EPA's *de minimis* interpretation is an appropriate vehicle to implement Congress' legislative design, and should be upheld, because it furthers rather than frustrates Congress' primary goals. *Public Citizen v. Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

A. Frustration of Congressional Objectives Under the Federal Food, Drug and Cosmetic Act

Congress has repeatedly acknowledged the unique role of pesticides in the FFDCA. As early as 1954, when that statute was amended to explicitly address pesticide residues, Congress found that:

> These chemicals have become vital tools in the production of an *adequate, wholesome and economical food supply*, and it is accepted that without them the health and living standards of this Nation and of other coun-

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true here, as the complex scheme for the regulation of pesticides involves " 'reconciling conflicting policies' 'committed to the agency's care by the statute.' " *Id.*, 467 U.S. at 844.

[6] Shortly after the Ninth Circuit's ruling, EPA's Assistant Administrator for Prevention, Pesticides and Toxic Substances stated that EPA had identified "roughly 30 pesticides" which would be effected. However, that number could grow as food processing data or new studies "show that additional chemicals or crops are within the scope of the Delaney clause." 19 *Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations* (July 23, 1992).

> tries dependent upon our food exports would be dangerously impaired.

H.R. Rep. No. 1385, 83d Cong., 2d Sess. 4 (1954), *reprinted in* 12 *A Legislative History of the FFDCA and its Amendments* at 833, 836 (Comm. Print 1979) (*Leg. Hist.*) (emphasis added). This understanding of the role and benefits of pesticides was expressly relied upon when the balancing standard used in the pesticide residue provision was developed. *Id.* at 8; 12 *Leg. Hist* at 840. This standard is integral to FIFRA's and FFDCA's overall regulatory scheme, of which the Delaney clause is a small but important part.

The same benefits which Congress recognized in 1954 remain as an important part in the current FFDCA. Today, when the Administrator issues a regulation to establish acceptable levels of pesticide residue on a raw agricultural commodity under FFDCA § 408, the Administrator is required to give appropriate consideration, among other factors, to " . . . the necessity for the production of an *adequate, wholesome,* and *economical* food supply." 21 U.S.C. § 346a(b) (emphasis added). An unfortunate but certain result of the Ninth Circuit's decision will be to remove many of agriculture's "vital tools," and make the production of an adequate, wholesome and economical food supply vastly more difficult.

Pesticides greatly assist amici's members in producing an *adequate* year-round food supply. Prior to the development of pesticides, when a serious disease or pest infestation would occur, the farmer would generally lose much of the entire crop. Even today, at least until needed pest and disease resistant varieties are developed, farmers *must* have a ready ac-

cess to appropriate, EPA-regulated pesticides to ensure that the food supply remains "adequate."

The Ninth Circuit's refusal to recognize EPA's *de minimis* interpretation ignores the legislative history of the FFDCA, and will most certainly have a significant adverse effect on the production of an adequate food supply. This result was suggested by the National Academy of Sciences and repeated by EPA earlier in the administrative record leading to this action,[7] when EPA concluded that a strict application of the Delaney clause could substantially increase the price and decrease the availability of certain foods, especially fruits and vegetables. 55 Fed. Reg. 17,560, 17,564-65 (April 25, 1990).

Pesticides are also an important factor in agriculture's mission to produce a *wholesome* food supply. After release of the decision in *Les v. Reilly* last summer, EPA's Assistant Administrator for Pesticides, Prevention and Toxic Substances concluded that the decision did not advance the congressional objective of a wholesome food supply. She said:

> . . .if the Ninth Circuit's decision stands at the end of the day, I foresee far-reaching and dramatic impacts on pesticide use in this country. *While I wish that I could say that these changes will contribute measurably to the safety of the food supply, it is not at all clear that that would be true.*

Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government

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[7] National Academy of Sciences, *Regulating Pesticides in Food: The Delaney Paradox* at 41-42, (1987). EPA adopted this conclusion at 55 Fed. Reg. 17,564 (April 25, 1990).

Operations 22 (July 23, 1992) (statement of Linda J. Fisher, EPA) (emphasis added). Indeed, the National Academy of Science concluded in 1987 that this very scenario may actually have adverse effects on food safety.[8] EPA agreed, and concluded that precisely the same reading of the Delaney clause which the Ninth Circuit now demands may actually create *increased* health risks due to increased production of natural toxins in plants, and may even lead to use of pesticides which pose relatively *higher* risk. 55 Fed. Reg. 17,560, 17,564.

Finally, pesticides greatly assist producers in providing Americans with an *affordable* food supply. 55 Fed. Reg. 17,560, 17,564. Americans currently spend a smaller percentage of their disposable income on food than do most other countries in the world.[9] To

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[8] According to the NAS:

> The committee can envision situations in which the current system would compel results that, at least in the short term, actually increase the human cancer risks from pesticides. For example, suppose a registered pesticide X with known oncogenic effects and an existing substitute Y which is a weaker oncogen are under review. Both agents produce roughly equal benefits for comparable uses. X does not concentrate in any processed apple products, but Y concentrates marginally. The EPA could be forced by the Delaney Clause to deny a section 409 tolerance for Y and also would be compelled to cancel its 408 tolerance and registration. Pesticide X would claim a larger share of the market. Human cancer risk would rise, not fall. National Academy of Sciences, National Research Council, *Regulating Pesticides in Food: The Delaney Paradox* at 41-42 (1987).

[9] Americans spend 10% of their disposable income on food,

maintain such low cost, today's farmers must choose wisely from among available pesticides. Because the cost of food and fibre is directly linked to the cost of inputs, farmers must select not only the most effective, but also the most economical pesticides available. The loss of many important pesticides through misinterpretation of the Delaney clause will significantly affect growers' costs and increase the cost of food and fibre.

B. Frustration of Congressional Objectives Under the Federal Insecticide, Fungicide and Rodenticide Act

When Congress undertook a comprehensive revision to FIFRA in 1972, it succinctly summarized the role of pesticides in modern American agriculture by stating that "[p]esticides are essential to man's food supply both as to quality and quantity." S. Rep. No. 838, 92nd Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 3995. Five years later Congress reaffirmed that an "overriding concern of FIFRA is that pesticides should be available to meet pest control needs." S. Rep. No. 334, 95th Cong., 1st Sess. 3, 5 (1977). And yet again, during the amendments to FIFRA which launched the current reregistration program[10], Congress confirmed that the purpose of the amendments was, in part, "to ensure that . . . agricultural producers, will have access to the effective and affordable products they need on the farm." H.R. Rep. No. 939, 100th Cong., 2d Sess.

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compared with the European Community (14%), Russia (28%), China (48%), and India (53%). USDA, Agricultural Economic Research Service, *Income Spent on Food: U.N. System of National Accounts*, National Food Review, December 1989.

[10] *See*, Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654.

28, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3474, 3477.

The use of EPA-regulated pesticides is a congressionally sanctioned, integral part of the current efficient, low cost system of food and fibre production. Yet, the Ninth Circuit's decision could very likely result in the eventual *loss* of at least thirty (30) essential pesticides[11]. Even if EPA were to adopt procedures or definitions to cushion the blow, should the Ninth Circuit's decision eventually be upheld, farmers will be left with significantly fewer pesticides to combat increasing numbers of weeds, pests and diseases. Consequently, the congressional objective of providing *amici* with access to those products which they need in the production of their crops will be defeated if EPA is required to begin revoking tolerances which exceed the zero-risk Delaney clause standard.

II. THE NINTH CIRCUIT'S STRICT READING OF THE DELANEY CLAUSE WILL PREVENT ADOPTION OF ENVIRONMENTALLY RESPONSIBLE FARMING TECHNIQUES

The loss of an array of available chemical pest control products will not merely disrupt the production and availability of food. Because the FFDCA is con-

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[11] EPA's Assistant Administrator for Prevention, Pesticides and Toxic Substances has testified that "roughly 30" pesticides would be affected, but cautioned that the number represented "only a portion of the total universe that *could* be affected." *Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations* 22 (July 23, 1992) (emphasis added). Respondents' lead counsel has asserted that "[d]ozens" of pesticides "could be banned." Maura Dolan, *Court Bans 4 Chemicals from Processed Foods*, L.A. Times, July 8, 1992, at A1.

cerned with the safety of food, the environmental impact of a strict interpretation of the Delaney clause is not readily apparent. However, the loss of a pesticide due to the Delaney clause may well result in the use of alternative pest control methods or devices which are less environmentally desirable. For example, if an important herbicide is no longer available, the result may be greater environmental damage due to increased need for plowing and tilling, or the reversion of farmland to noxious weeds.

Additionally, many of the incentives for growers to adopt or implement environmentally desirable farming techniques will also be lost. In order to effectively and economically control pests, farmers need both chemical and non-chemical pest control strategies. One such strategy is known as Integrated Pest Management ("IPM"). IPM encourages farmers to practice a combination of environmentally sensitive farming practices. It is generally defined as a pest and plant disease control strategy which is based on the determination of an economic threshold that indicates when a pest population or disease is approaching the level at which control measures are necessary to prevent a decline in net returns—that is, when the predicted value of the impending crop damage exceeds the cost of controlling the pest. The key to IPM is the exercise of prudence in the use of external—including pesticidal—inputs. However, strategies such as IPM are dependent on the continued *availability* of a *variety* of traditional chemical solutions when alternative strategies fail.

There are three general components of IPM: cultural practices (appropriate crop/soil selection, crop rotation, tillage practices, and careful timing for

watering and weeding), monitoring pests and diseases (generally by careful scouting), and treatment (with a pesticide) if the pest or disease reaches a pre-determined level of economic damage. Before a farmer would adopt an IPM strategy, he or she must be sure that a variety of products needed for treatment will be available if the cultural practices fail.

IPM has been practiced in varying degrees since the late 1960's but it is now rapidly gaining acceptance among farmers. By 1986, nearly 40 million acres of soybean, wheat, corn and cotton cropland alone were successfully grown utilizing IPM techniques to control pests and plant diseases. Those already impressive numbers are expected to increase significantly through the 1990's and beyond. USDA, Cooperative Extension Service, *Agricultural Statistics, National IPM Program*, Washington, D.C. (1987). However, the effectiveness of IPM continues to "rely on precise application of specific pesticides." W.A. Allen, *The National Evaluation of Extension's Integrated Pest Management Programs*, Virginia Cooperative Extension Service, 1987. A decrease in available pesticide products due to a strict reading of the Delaney clause will lead directly to a loss of acres utilizing IPM techniques.

Finally, the availability of fewer pesticidal products will further exacerbate another environmental problem: pest resistance. In a 1987 report, the National Research Council addressed pest resistance, a condition which results from repeated exposure to the same product, and concluded that:

> *Long-term adverse implications can also arise from recurrent use of the same or related*

> *pesticides.* The emergence of pesticide resistant pest populations is a particularly worrisome phenomenon. Neglecting pest resistance may lead to higher volume or more frequent application of pesticides, with serious economic consequences for the individual farmer, the industry, and even the nation.

National Research Council, *Alternative Agriculture* 10 (1987) (emphasis added). As the number of available pesticide products diminishes due to the Ninth Circuit's decision, farmers will become more dependent on fewer products when the need to control a pest infestation arises,[12] and may unwittingly contribute to an increase in pest resistance.

EPA's use of a *de minimis* interpretation allows the agency to reconcile conflicting statutory provisions, while simultaneously assuring farmers that a variety of pest control products would be available to meet their needs. All of this was accomplished while assuring the public that products whose risks outweighed their benefits would not be used. The Ninth Circuit's failure to recognize the value and wisdom of that interpretation will hurt not only agriculture, but may threaten the nation's food supply and environment as well.

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[12] The problem of pest resistance is not unique to chemical pesticides. A recent New York Times article described how this phenomena is already decreasing the effectiveness of new biological pesticides. The article quotes Dr. R. James Cook, of the Washington State University Department of Agriculture as cautioning "It's really important never to put all your eggs in one basket and to use a diversity of approaches." William Stevens, *Natural Pest-Killer's Power Wanes,* New York Times, December 29, 1992, at C1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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